

1994

# State of Utah v. Joseph A. Chavez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Respondent : Case No. 940404CA  
VS. :  
JOSEPH A. CHAVEZ : **Priority No. 2**  
Defendant/Appellant. :

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BRIEF OF APPELLANT

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Appeal from a Revocation of the Defendant's  
Probation and Sentence to Imprisonment in the Utah State Prison  
of 0 to Five Years upon a Plea  
of Guilty to a Second Degree Felony, Which the Defendant  
Filed a Petition to Withdraw, Which Petition was Denied.

**UTAH COURT OF APPEALS**

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**FILED**

OCT 26 1994

**COURT OF APPEALS**

STATE OF UTAH, :

Plaintiff/Respondent : Case No. 940404CA

VS. :

JOSEPH A. CHAVEZ :

Defendant/Appellant. :

Appeal from a Revocation of the Defendant's  
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Filed a Petition to Withdraw, Which Petition was Denied.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
Plaintiff/Appellee,	:	
vs.	:	Case No. 940404-CA
JOSEPH A. CHAVEZ	:	
Defendant/Appellant.	:	

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JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a revocation of the Defendant's probation and sentence to imprisonment to the Utah State Prison of 0 to 5 years, to run concurrent with the Defendant's 1 to 15 years prison term upon a plea of guilty to a burglary charge, after a hearing before the Honorable Stanton M. Taylor on the 5th day of July, 1994. Jurisdiction to hear the above-entitled appeal is conferred upon the Supreme Court of the State of Utah pursuant to Utah Code annotated, 78-2-2(3)(i) (1953 as amended) and Rule 26 of the Utah Rules of Criminal Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Did the District Court abuse its discretion in revoking Defendant's probation, when he plead guilty to a charge of burglary, then moved to withdraw the plea with the statutory period, which motion was denied by the sentencing judge, and the Honorable Stanton M. Taylor sentenced the Defendant to serve a term of 0 to five years at the Utah State Prison, said sentence to run concurrent with the sentence imposed for the burglary.

Standard of Review A determination to revoke probation is within the discretion of the Trial Court. The Appellate Court will reverse only if the evidence, when viewed in a light most favorable to the Courts decision is so deficient that it must be concluded the Trial Court abused its discretion State v. Ruega 851 P 2d 1229 (Utah App 1992)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated Section 64-13-29, UCA.

(1) The department shall ensure that the court is notified of violations of the terms and conditions of probation in the case of probationers under the department's supervision, or the Board of Pardons and Parole in the case of parolees under the department's supervision. In cases where the department desires to detain an offender alleged to have violated his parole or probation and where it is unlikely that the Board of Pardons and Parole or court will conduct a hearing within a reasonable time to determine if the offender has violated his conditions of parole or probation, the department shall hold an administrative hearing within a reasonable time, unless the hearing is waived by the parolee or probationer, to determine if there is probable cause to believe that a violation has occurred. If there is a conviction for a crime based on the same charges as the probation or parole violation, or a finding by a federal or state court that there is probable cause to believe that an offender has committed a crime based on the same charges as the probation or parole violation, the department need not hold its administrative hearing.

(2) The appropriate officer or officers of the department shall as soon as practical following the department's administrative hearing, report to the court or the Board of Pardons and Parole, furnishing a summary of the hearing, and may make recommendations regarding the disposition to be made of the parolee or probationer. Pending any proceeding under this section, the department may take custody of and detain the parolee or probationer involved for a period not to exceed 72 hours excluding weekends and holidays.

(3) If the hearing officer determines that there is probable cause to believe that the offender has violated the conditions of his parole or probation, the department may detain the offender for a reasonable

period of time after the hearing or waiver, as necessary to arrange for the incarceration of the offender. Written order of the department is sufficient authorization for any peace officer to incarcerate the offender. The department may promulgate rules for the implementation of this section.

#### STATEMENT OF THE CASE

This is an appeal from a revocation of the Defendant's probation by the Honorable Stanton M. Taylor during a hearing held July 5, 1994, based upon Defendant's plea of guilty to a charge of burglary, for which the Defendant filed a motion to withdraw the plea, which motion was denied by the Honorable Michael J. Glasmann on the 13th day of June, 1994. The Defendant was sentenced to serve a term at the Utah State Prison of 0 to five, years, to run concurrent with the sentence of 1 to 15 years for burglary.

The Defendant, through Martin V. Gravis, filed a Notice of Appeal with the District Court of the Second Judicial District Weber County, State of Utah, which appeal was directed to the Utah Court of Appeals as case number 940404.

#### STATEMENT OF FACTS

On the 5th day of July, 1994 the Honorable Stanton M. Taylor conducted a hearing to determine if the Defendant's probation should be revoked based upon the Defendant, on March 16, 1994, plea of guilty to a 2nd Degree Felony, burglary. Subsequent, the Defendant, within the 30 day period, filed a motion, through his attorney, to withdraw the plea. The Honorable Michael J. Glasmann on the 13th day of June, 1994 denied the motion to



withdraw the plea of guilty. (T. June 13, 1994 p 67)

On the 7th day of April, 1994, the Adult Parole and Probation Department of the State of Utah filed an affidavit alleging that the Defendant violated condition #5 of his probation agreement by being convicted of the offense of burglary, a second degree felony.

On the 5th day of July, 1994, the Honorable Stanton M. Taylor held a hearing on the affidavit filed in the instant case and heard testimony of Mr. Raymond J. Salaz, the supervising probation officer, who testified of the conditions of the probation agreement, and that the Defendant had violated paragraph 5 of said agreement by pleading guilty to a felony. (T. pg's 2-5)

Counsel for Defendant argued that this hearing be deferred until the appeal of Judge Glasmann's denial of the motion to withdraw his guilty plea to the 2nd degree felony, burglary. This request was denied by the Honorable Stanton M. Taylor. (T, pg's 6-7)

The Defendant was sentenced to serve a term of 0 to five years at the Utah State prison, to run concurrent with the sentence for the burglary charge.

#### SUMMARY OF ARGUMENT

The Trial Judge committed reversible error by revoking the Defendant's probation prior to the Appellate Court's hearing his appeal of a denial of his motion to withdraw his guilty plea rendered by the Honorable Michael J. Glasmann on the 13th of

June, 1994.

ARGUMENT

THE TRIAL JUDGE COMMITTED REVERSIBLE  
ERROR IN REVOKING THE DEFENDANT'S PROBATION PRIOR TO A FINAL  
DECISION ON THE DEFENDANT'S APPEAL OF A DECISION  
DENYING THE DEFENDANT THE RIGHT TO WITHDRAW HIS  
PLEA OF GUILTY TO A 2ND DEGREE FELONY, BURGLARY

As stated by this Court in the case of State v. Ruega, supra  
(1952) a determination to revoke probation is within the  
discretion of the Trial Court. However, the Utah Supreme Court  
in the case of State v. Cowdwell 626 P2d 487 (Utah) stated at  
page 488:

"Nevertheless, in revoking a probation, a Court may not  
ignore fundamental precepts of fairness protected by  
the due process clause."

Further this Court in the case of State v. Hodges 798 P2nd  
270 (Utah App) stated at page 271 that:

"Willful violation of a condition of probation is  
necessary before probation can be revoked."

In the instant case the condition upon which the Defendant  
was willing to plead guilty to the charge of robbery was that in  
sentencing the Prosecution was to remain silent and make no  
comments at the date of sentencing. The Utah Supreme Court in  
the case of State v. Plum 378 P2d 671 (Utah 1963) at page 673  
stated:

"At a subsequent hearing, the adult probation authority  
rendered its report, defense counsel made a statement  
in behalf of his client, and the prosecutor lived up to  
the bargain by recommending probation."

This case is contrasted with the decision of the United  
States Supreme Court in the Santobello v. New York case, 404 U.S.


257, 92 S. Ct. 495, 30 L. Ed. 2nd 429 (1971) where the prosecutor did not abide by another prosecutor in the same office and the Court held that the Defendant had the option of either compelling the Prosecutor to abide by the agreement or allow the Defendant to withdraw the plea.

In this case the Defendant believes that the Prosecutor did not live up to the agreement upon which he entered his plea of guilty and that fundamental fairness bolstered by due process requires that his probation not be revoked until his appeal is decided on whether he shall be permitted to withdraw his plea of guilty and enter a plea of innocence to the charge of burglary. If the Court rules for the Defendant then until he is convicted beyond a reasonable doubt of the felony charged, he has not violated the terms of his probation, and he should not be sentenced at this junction to an additional term of 0 to five years incarceration at the Utah State Prison.

#### CONCLUSION

The Trial Judge committed reversible error in revoking the Defendant's probation prior the resolution of the Defendant's appeal on whether the Defendant should be permitted to withdraw his plea of guilty to a 2nd degree felony and enter a plea of not guilty.

RESPECTFULLY SUBMITTED this 20 day of October, 1994

  
Martin V. Gravis  
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the above and foregoing Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid this 26 day of Martin V. Gravis this day of October 1994.

A handwritten signature in black ink, appearing to read 'Martin V. Gravis', is written over a horizontal line.

Martin V. Gravis  
Attorney for Appellant

P R O C E E D I N G S

THE COURT: This is Chavez, Case No. 0111?  
Yeah. Show that the defendant's present with his  
attorney, Mr. Gravis; and the state's represented by  
Mr. Darcoci. This matter's here on your motion,  
Mr. Gravis?

MR. GRAVIS: Yes, a motion to withdraw guilty  
plea.

THE COURT: And the Court heard some argument  
in the area on the law and motion calendar, I believe  
it was probably two weeks ago or a week and a half ago.  
What I indicated is that I would review the record as  
to what was said in the Court's discussions with the  
defendant in the past and determine whether I thought  
it was appropriate to allow the withdrawal of the  
guilty plea.

The Court's done that, and I'm going to deny  
the request for withdrawal of the guilty plea.

MR. GRAVIS: Your Honor, would the Court make  
some findings; or has the Court made a -- to Mr. --

THE COURT: Yeah, I will make some findings.  
The issue that was raised is there was a plea  
negotiation in this case whereby the state had agreed  
with the defendant that in exchange for the defendant  
pleading guilty to a particular charge, and I don't

1 THE COURT: Are you prepared, Mr.  
2 Gravis, on Chavez?

3 MR. DAINES: Your Honor, we have a  
4 stipulation in this case, a commitment to the state  
5 prison and a Utah Department of Corrections face  
6 sheet, both of which are state records kept in the  
7 usual course of business for the state; however,  
8 neither one is certified. They will stipulate for  
9 the purpose of this hearing that these are, in fact,  
10 accurate records and proceedings.

11 MR. GRAVIS: That's correct, Your  
12 Honor.

13 THE COURT: Very well.

14 MR. DAINES: We would call Mr. Ray  
15 Salaz to the stand.

16 RAYMOND J. SALAZ,  
17 being first duly sworn, was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. DAINES:

21 Q. State your name and occupation, please.

22 A. Raymond J. Salaz. I work for the Department of  
23 Corrections, Adult Probation and Parole.

24 Q. Mr. Salaz, calling your attention to the  
25 gentleman seated here at counsel table in the blue

1 shirt, do you know him?

2 A. Yes, I do.

3 Q. What is his name?

4 A. Joseph A. Chavez.

5 Q. How do you know him?

6 A. He was placed on probation initially with the --  
7 through the Second District Court, and I've been his  
8 supervising officer.

9 Q. Do you -- did you bring with you today his  
10 Probation Agreement?

11 A. Yes, I have.

12 Q. Is the Probation Agreement kept in the usual and  
13 customary course of the business of the Department of  
14 Corrections department -- I mean, Field Op Division  
15 or whatever they call themselves?

16 A. Field Operations.

17 Q. In other words, AP&P?

18 A. AP&P, yes.

19 Q. Okay. And did you bring that with you today?

20 A. Yes, I have.

21 Q. Do you -- having worked with Mr. Chavez, do you  
22 recognize his signature?

23 A. Yes, I do.

24 Q. Do you have in your file a signed Probation  
25 Agreement?

1 A. Yes, I have.

2 Q. Signed by Mr. Chavez?

3 A. Yes, I have.

4 Q. Is there a provision in that agreement signed by  
5 him that makes it a violation of his probation to  
6 commit a crime?

7 A. Yes, there is.

8 Q. What paragraph is that?

9 A. That's condition number 5.

10 Q. Please read that.

11 A. "I shall" --

12 MR. GRAVIS: Your Honor, we'll  
13 stipulate that paragraph 5 contains a not to commit  
14 any other crime provision.

15 THE COURT: All right.

16 Q. (By Mr. Daines) Have you further brought with  
17 you today a form -- I don't see a number on this  
18 form.

19 A. It's just -- we label it a face sheet, a  
20 department face sheet for intake purposes.

21 Q. And is this -- and that's intake into the state  
22 prison; is that correct?

23 A. Actually it's an intake sheet that we use as a  
24 form to -- identifying characteristics of the case,  
25 of the person, the individual, that we use and keep



1 as a record in our files.

2 Q. Did you, also, bring with you a commitment to the  
3 state prison?

4 A. Yes, I did.

5 Q. Now, this -- that commitment shows the commitment  
6 is for Burglary, a Second Degree Felony; is that  
7 correct?

8 A. Yes, that's correct.

9 Q. You have caused to be filed a probation -- an  
10 Affidavit of Probation Violation alleging Burglary, a  
11 Second Degree Felony, as the undergirding charge in  
12 the probation violation; is that correct?

13 A. That's correct.

14 Q. And that is the Affidavit that is before the  
15 court for hearing today?

16 A. That's correct.

17 Q. The commitment to the state prison that I'm going  
18 to show you here, to which the defense has  
19 stipulated, is this the same Burglary, a Second  
20 Degree Felony --

21 A. Yes, it is.

22 Q. -- as you've alleged in your affidavit?

23 A. Yes, it is.

24 MR. DAINES: I have nothing further.

25 MR. GRAVIS: No questions, Your

1 Honor.

2 THE COURT: You may step down.

3 MR. DAINES: Your Honor, we would --  
4 if I may approach the bench.

5 THE COURT: Yes, you may.

6 MR. DAINES: This is a non-certified  
7 copy that's been stipulated to. I don't think you  
8 need the face sheet. That shows a commitment -- a  
9 conviction and commitment for Burglary, a Second  
10 Degree Felony.

11 THE COURT: Okay.

12 MR. DAINES: And based on that, we  
13 would rest.

14 THE COURT: All right. Mr. Gravis?

15 MR. GRAVIS: Your Honor, for the  
16 record, Mr. Chavez has -- did enter a plea of guilty  
17 to the Second Degree Burglary before Judge Glasmann.  
18 We filed a Motion to Withdraw a Guilty Plea. It was  
19 heard, I believe, two weeks ago -- three weeks ago.  
20 The decision came down two weeks ago on the 13th of  
21 June. It was denied. We have since filed an appeal  
22 on the denial of the Motion to Withdraw a Guilty  
23 Plea. This hearing was put on today simply to  
24 preserve this issue for appeal on this matter, Your  
25 Honor, fully understanding that the evidence would be

1 before the Court of the conviction.

2 MR. DAINES: Your Honor might  
3 remember this case. It was a case where the original  
4 Affidavit alleged "convicted of the offense of  
5 Burglary", and at that time they objected -- the  
6 defense -- to that, because of the fact that they had  
7 filed the motion to withdraw the plea and that was  
8 pending at that time, a hearing before a district  
9 judge.

10 We were actually going to put on the offense  
11 of burglary, but since that time, apparently the  
12 district court has denied the motion to withdraw the  
13 plea. And so we would submit that the conviction is  
14 an assumption that he committed it.

15 THE COURT: Yeah. Well, I think you  
16 have preserved the issue from the standpoint of the  
17 record.

18 MR. GRAVIS: Your Honor, we're  
19 prepared to be sentenced at this time. Mr. Salaz is  
20 prepared to recommend zero to five, concurrent with  
21 the one to 15.

22 THE COURT: Is that correct,  
23 Mr. Salaz?

24 MR. SALAZ: That's correct, Your  
25 Honor.